

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Crosbie et al.

Examiner: Mark Le

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For: OVER-WAY PLATFORMS FOR TRANSPORTATION SYSTEMS

Commissioner for Patents
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AMENDED APPEAL BRIEF

Appeal from Group 3617

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This Appeal is from a Final Office Action mailed on August 15, 2007 (referred to as the “Final Action”) and an Advisory Action mailed on October 30, 2007 (Advisory Action). This Appeal was commenced by a Notice of Appeal and Pre-Appeal Brief Request for Review filed on December 17, 2007. A Notice of Panel Decision was mailed on January 8, 2008 indicating that the application remains under appeal, and Appellants hereby submit this Appeal Brief in furtherance of the Appeal.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified application is Atlantic-Heydt Corporation, the assignee of the entire right, title and interest in and to the subject application by virtue of an assignment of recorded in the U.S. Patent and Trademark Office on March 19, 2004 at Reel/Frame 015120/0674.

II. RELATED APPEALS AND INTERFERENCES

There are no Appeals or Interferences known to Applicant, Applicant’s representatives or the Assignee, which would directly affect or be indirectly affected by or have a bearing on the Board’s decision in the pending Appeal.

III. STATUS OF CLAIMS

Claims 15~20 and 22~23 and 25 are pending, stand rejected and are under appeal. The claims are set forth in the attached Appendix.

IV. STATUS OF AMENDMENTS

An after final amendment was filed on October 15, 2007 cancelling claims 1-14, 21, 24 and 26-44. The Advisory Action indicated that the AF Amendment would be entered for purposes of appeal and, thus, the claims set forth in the Claims Appendix reflect the claims that are pending upon entry of the AF Amendment and which are subject to this appeal.

V. SUMMARY OF CLAIMED SUBJECT MATTER

In general, the claimed inventions are directed to reusable, portable and secure platform structures, which can be installed over existing railway lines and which may be employed to extend an existing permanent passenger platform over one or more railway tracks to provide access and egress over the existing rail lines to a transporting vehicle (e.g., train) that is remote from the permanent platform

For purposes of illustration, the subject matter of the claims will be described with reference to certain Figures and corresponding text of Appellants' Specification (hereinafter, "Spec."), for example, but nothing herein shall be deemed as a limitation on the scope of the invention. For each Claim listed below, the claim elements are presented in italicized text, and are followed by citation to exemplary figures and/or supporting text in Appellants' Spec.

Claim 15 recites:

*A portable over-way platform structure [(10); (20, 22, 30)] for a railway system, comprising (See generally, FIGs. 1, 2 and 3 and Spec. p. 5, line 14 ~ p. 10, line 15)
a portable platform (20) configured to bridge a first track (12) to permit*

pedestrian traffic to cross over the first track (12) to and from a permanent platform (16), (See, e.g., FIG. 1 and Spec., p. 5, lines 14~23)

the portable platform (20) having an uppermost surface maintained at a same level relative to the permanent platform (16), the portable platform (20) being self-supporting (via framework 22) and independent from the permanent platform (16) for maintaining the same level; (See, e.g., FIGs 2 and 3 and Spec., p. 7, lines 5~17; and p. 8, line 16 ~ p. 9, line 7).

a safety fence (30) coupled to the uppermost surface of the portable platform (20) and arranged transversely to a direction of the length of the first track (12) for pedestrian safety; (See, e.g., FIGs 2 and 3 and Spec., p. 9, line 22 ~ p. 10, line 8)

a trolley (24) coupled to the portable platform (20), which supports a wheel system (25, 26); (See, e.g., FIGs 2 and 3 and Spec., p. 7, lines 8-23; and p. 8, lines 2-14)

a positioning system (35) coupled between the trolley (24) and the portable platform (20) to provide vertical and horizontal adjustment of the portable platform (20) relative to the wheel system (25, 26) to maintain the same level; (See, e.g., FIGs 2 and 3; and Spec., p. 7, lines 5-8; and p. 8, line 16 ~ p. 9, line 7) and

wheels (26) included in the wheel system (25, 26) to engage the first track (12) to permit the portable platform structure (20) to be moved along the first track (12) to permit placement of the platform structure (20). (See, e.g., FIGs 2 and 3 and Spec., p. 7, lines 10 ~ 17).

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

A. Claims 15-18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Nijenhuis (U.S. Patent No. 6,401,624) in view of Coslovi (U.S. Patent No. 5,743,191) and Coath (U.S. Patent No. 701,469)

B. Claims 19 and 22-23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Nijenhuis, Coslovi and Coath as applied to claim 15, and further in view of Fowler (U.S. Patent No. 2,190,708)

C. Claim 20 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Nijenhuis, Coslovi and Coath as applied to claim 15, and further in view of Hogue (U.S. Patent No. 4,224,880)

D. Claim 25 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Nijenhuis, Coslovi and Coath as applied to claim 15, and further in view of Farmer (U.S. Patent No. 1,980,329).

VII. ARGUMENTS

A. The Combination of Nijenhuis, Coslovi and Coath is Legally Deficient To Support a *Prima Facie* Case of Obviousness Against Claim 15

Appellants respectfully submit that the combination of Nijenhuis, Coslovi and Coath is legally deficient to support a *prima facie* case of obviousness against the subject matter of claims 15~18. For purposes of this Appeal, Appellant submit that at the very least, the subject matter of independent claim 15 is patentable and non-obvious in view of the combined teachings of Nijenhuis, Coslovi and Coath.

In rejecting claims under 35 U.S.C. Section 103, the examiner bears the initial burden of

presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). It is well established that a *prima facie* showing of obviousness requires, in general, a two part analysis – starting with a claim interpretation analysis to determine the scope and substance of the subject matter being claimed, followed by an obvious analysis to determine whether the claimed subject matter (as interpreted) is obvious in view of the prior art. Once the claims have been properly constructed, the Examiner has the burden of establishing a *prima facie* case of obviousness.

A *prima facie* case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art. *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993). The burden of presenting a *prima facie* case of obviousness is only satisfied by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). The test for obviousness is what the combined teachings of the applied prior art references would have suggested to one of ordinary skill in the art. *In re Keller*, 642 F.2d 413, 435; 208 U.S.P.Q. 871, 881 (CCPA 1981). The suggestion to combine the references should come from the prior art, and the Examiner cannot use hindsight gleaned from the invention itself to pick and choose among related prior art references to arrive at the claimed invention. *In re Fine*, 837 F.2d at 1075. If the Examiner fails to establish a *prima facie* case, the rejection is improper and must be overturned. *In re Rijckaert*, 9 F.3d at 1532 (citing *In re Fine*, 837 F.2d at 1074).

Appellants respectfully submit that the obviousness rejection of claim 15 as set forth in paragraph 7 (pages 4-6) of the Final Action is based, primarily, on erroneous characterizations, assumptions and misinterpretations of the teachings of the cited references, in particular, Nijenhuis and Coath, as applied to many of the features of claim 15. In particular, the Examiner relies primarily on mischaracterizations and strained interpretations of the teachings of Nijenhuis as modified by Coath to improperly reconstruct various features of the subject matter recited in claim 15. The prior art teachings of Nijenhuis and Coath relied on by the Examiner are summarized as follows.

Nijenhuis

In formulating the rejection of claim 15, the Examiner relies primarily on the teachings of Nijenhuis in FIG. 2 and Col. 6, lines 19~59, which discloses a railway wagon 6 with a substructure 13 bearing wheels 6 and a superstructure 14 (the supposed “portable platform”) having a loading floor 15. The portable platform 14 is supported on the substructure 13 by a resilient suspension system including pneumatic spring systems 17 that operates to move the platform 14 upwards and downwards so that the platform can be lowered onto supports 11 that protrude from the sidewalls of the permanent platforms 4 and 5 on either side of a section of track 3. The platform 14 includes stop surfaces 18, which are used to support the platform 14 on supports 11.

Nijenhuis specifically teaches that the supports 11 on the sidewalls of the permanent platforms 4, 5 are needed so that the loading floor 15 of the platform 14 will remain at a fixed and predetermined height during loading and unloading (see Abstract). In particular, Nijenhuis

teaches the use of the support 11 as improvements over conventional schemes for the purpose of supporting the platform 14 and ensure that the loading floor 15 is situated at a predetermined, fixed height during loading and unloading by preventing the platform 14 from springing in and out with respect to the substructure 13 during loading and unloading. (see, Col. 1, lines 29-65; Col. 6, lines 44-53, and Col. 8, lines 1-10).

Coath

In formulating the rejection of claim 15, the Examiner further relies on the teaching of Coath regarding a “pivot mechanism” for railway vehicles to enable the wheel axles of a railway vehicle to turn independently of the body of the vehicle upon a pivot perpendicular to the center of the length of the wheel axle (Col. 1, lines 24-27). More specifically, Coath discloses in FIGs. 1 and 3, a wheel system including *axle c* and *flanged wheels a*, which are connected to a *truck frame e* via *journal boxes d* and *springs h*, and where the *truck frame e* is connected to the bottom of a *vehicle body g* via a *center pivoting bolt f mechanism*. (Col. 1, lines 34 – Col 2, line 46). Coath’s “pivot mechanism” (via *bolt connection f*) allows the axle and wheels to turn independently of the body of the vehicle while the vehicle travels around curved tracks and thereby reduce the frictional wear upon the rails by the wheels (see Col. 2, lines 49-56) .

(i) In view of the clear teachings outlined above, Appellants respectfully submit that the combination of Nijenhuis and Coslovi and Coath does not fairly teach or suggest the subject matter of claim 15 which recites:

a portable platform configured to bridge a first track to permit pedestrian traffic to cross over the first track to and from a permanent platform, the portable platform having an uppermost surface maintained at a same level relative to the permanent platform, the portable platform being self-supporting and independent from the permanent platform for maintaining the same level.

In formulating the rejection of claim 15, the Examiner relies on Nijenhuis as teaching the above cited claim features and, in particular, on page 4 of the Final Action, the Examiner contends that:

Nijenhuis discloses a portable platform structure similar to that recited in the instant claims, including platform 15, a trolley under the platform including wheels 16, and suspension system 17, which includes pneumatic means to allow adjustment and position of the platform.

The Examiner's reliance on Nijenhuis in this regard is clearly misplaced. Although Nijenhuis arguably discloses a portable platform 14 having an uppermost surface 15 that can be maintained at a same level relative to permanent platforms 4, 5, Nijenhuis clearly does not teach that the *portable platform is self-supporting and independent from the permanent platform for maintaining the same level* to the permanent platforms 4, 5, as contemplated in the subject matter of claim 15. In fact, in the obviousness analysis, the Examiner seemingly acknowledges that Nijenhuis does not specifically teach that the platform 15 is self-supporting structure independent from the permanent platforms (4,5) for maintaining the same level between the portable and permanent platform , but rather relies on an "inherency theory" to support the rejection. In particular, the Examiner contends on pages 4-5 of the Final Action that:

Regarding the instant claimed portable platform being self-supporting and independent from the permanent platform, as recited in instant claims 15-18, it is noted that the portable platform of Nijenhuis is inherently capable of self-supporting and independent from a permanent platform that does not have support elements 11 attached to the sides of the permanent platform. On the other hand, it is noted that support elements 11 of Nijenhuis are provided for added enhancement of vertical stability of the platform during loading of a heavy load container onto the portable platform. However, it certainly would have been obvious to one skilled in the art to choose not to provide such support element 11 at a perform platforms for operating with light loads, such that the use of such support elements 11 is not critical for

maintaining vertical stability of the portable platforms during loading of a light load.

To rely on the doctrine of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art. In order for something to be “inherent” in a disclosure it must be the necessary and only reasonable construction to be given to the disclosure, that is, the result claimed must inevitably occur. The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993). Inherency is not established by possibility or probability; for a result to be deemed inherent, it must invariably exist or occur.

In this regard, the Examiner’s finding that Nijenhuis “inherently” teaches a *portable platform is self-supporting and independent from the permanent platform for maintaining the same level* is simply not supported by factually and legally sound reasoning. Fundamentally, the Examiner fails to address or otherwise explain how, in the absence of the supports 11, the platform 14 in Nijenhuis is capable, of being self supporting and independent of the permanent platform, solely by virtue of the pneumatic spring systems 17, for purposes of maintaining the platform surface at the same level of the permanent platform as the load on the platform varies during loading/unloading.

In fact, the Examiner’s “inherency” theory is contrary to the clear teachings of Nijenhuis where, as noted above, Nijenhuis specifically teaches that the supports 11 on the sidewalls of the permanent platforms 4, 5 are needed so that the loading floor 15 of the platform 14 will remain at a fixed and predetermined height during loading and unloading (see Abstract). Most tellingly, as

noted above, Nijenhuis teaches the use of the support 11 as improvements over conventional schemes for the purpose of supporting the platform 14 and ensure that the loading floor 15 is situated at a predetermined, fixed height during loading and unloading by preventing the platform 14 from springing in and out with respect to the substructure 13 during loading and unloading. (see, Col. 1, lines 29-65; Col. 6, lines 44-53, and Col. 8, lines 1-10).

In this regard, the Examiner's finding that "use of such support elements 11 is not critical for maintaining vertical stability of the portable platforms during loading of a light load" is nothing more than a bald, conclusory assertion that is not supported by the teachings of Nijenhuis. In fact, this finding is contrary to the teachings of Nijenhuis that the supports 11 are used to ensure *that the level of the platform floor will remain constant with regard to the surfaces of the permanent platform and not vary due to the springing action of the suspension system as the weight on the top of the platform varies upon loading/unloading cargo.*

In this regard, there is no reasonable basis for the Examiner's finding that support elements 11 of Nijenhuis are "only" provided for added enhancement of vertical stability of the platform during loading of a heavy load container onto the portable platform. There is nothing in Nijenhuis that teaches or suggests that in the absence of the platform 15 resting on the supports 11, that the pneumatic spring system 17 would be capable of providing sufficient vertical stability and support of the platform during any loading/unloading conditions, heavy or light, and thereby prevent springing action of the platform upon loading and unloading of cargo. Without resting on supports 11, the surface 15 of the portable platform 14 of Nijenhuis would not be able to maintain the same level as the surface of the platforms 4 and 5 due to the springing action provided by the suspension system 17 during loading/unloading conditions.

The Examiner's finding (in support of the inherency theory) that the supports 11 are not critical is further undermined by the fact that the supports 11 are also used maintaining the level of the surface 15 of the platform 14 at the same level of the permanent platforms 4 and 5 on either side when the permanent platform surfaces are not level with each other, i.e., by resting the platform 14 on supports 11, it is ensured that the surface edges of the platform are even with the surfaces of the permanent platforms (see Col. 6, lines 49-58).

Thus, for at least the above reasons, the Examiner's reliance on Nijenhuis as "inherently" teaching a *portable platform is self-supporting and independent from the permanent platform for maintaining the same level* is wholly misplaced, and based on conjecture and surmise in an effort to fit the disparate teachings of Nijenhuis to the claimed invention.

(ii) Furthermore, Appellants respectfully submit that the combination of Nijenhuis and Coslovi and Coath does not fairly teach or suggest the subject matter of claim 15 which recites:

a positioning system coupled between the trolley and the portable platform to provide vertical and horizontal adjustment of the portable platform relative to the wheel system to maintain the same level.

In formulating the obviousness rejection of claim 15 with regard to the claimed "positioning system", the Examiner notes on pages 5-6 of the Final Action that:

Nijenhuis alone does not include the positioning system as claimed, but Nijenhuis, as modified in view of Coath, includes such horizontal pivot of Coath, and springs 17 that permit horizontal and vertical adjustments, respectively, and allow the platform to be maintained the same level as broadly claimed.

Although the factual basis for this finding is not completely clear and understood, the Examiner seemingly finds (on page 5 of the Final Action) that Nijenhuis' spring (suspension) system 17 allows for vertical adjustment but not horizontal adjustment, but relies on Coath as curing the deficiencies of Nijenhuis in this regard.

However, the Examiner's reliance on Coath as disclosing a "pivot" mechanism that can be used in the system of Nijenhuis to provide a "positioning system" that provides horizontal adjustment of the portable platform relative to the wheel system to maintain the same level is wholly misplaced, and not grounded on reasonable facts or logic but rather a strained attempt to fit irrelevant teachings of the prior art to meet the claimed features. As noted above, Coath discloses the use of a "pivot mechanism" for railway vehicles to enable the wheel axles of a railway vehicle to turn independently of the body of the vehicle upon a pivot perpendicular to the center of the length of the wheel axle (Col. 1, lines 24-27). This teaching of a "pivot" mechanism is clearly irrelevant and starkly different from the claimed "positioning system" that enables *horizontal displacement of the platform relative to the wheels*. At most, Coath teaches *rotational displacement* of the wheel system relative to a vehicle body.

Even assuming, *arguendo*, that Coath's pivoting mechanism can somehow be viewed as enabling horizontal displacement of a platform relative to the wheels, it is fundamentally clear that such pivoting mechanism in Coath is designed to occur automatically and freely during motion of the railway vehicle as a result of inertia forces created while the railway vehicle is traveling around curved path. In contrast, the claimed inventions are directed to stationary platforms for pedestrian traffic. Accordingly, even if the "pivot mechanism" of Coath was used in the Nijenhuis system, any such horizontal adjustment of the platform 14 due to "pivoting"

from motion forces would not occur because the Nijenhuis system is stationary during use and operation of the platform system. Moreover, even if the wheel system of Nijenhuis could be made to pivot (via some automation) relative to the platform while in stationary position, it is clear that such pivoting would result in rotational displacement of the platform, but clearly not *horizontal adjustment of the portable platform*, as contemplated by the claimed invention.

In view of the above, Appellants submit that the teachings of Nijenhuis as modified by Coath utterly fails to teach or suggest, for example, a positioning system coupled between the trolley and the portable platform to provide vertical and horizontal adjustment of the portable platform relative to the wheel system to maintain the same level, as claimed in claim 15. Most tellingly, in the obviousness analysis, the Examiner fails to set forth or otherwise explain (on page 6 of the Final Action) the grounds on which one of ordinary skill in the art would be motivated to modify Nijenhuis suspension system 17 to include pivoting rotational movement in view of the teachings of Coath. Obviously, such modification would make no sense technically, as there is seemingly no stated or inherent advantage or purpose in Nijenhuis for having a portable platform structure able to rotate about a pivot about an axis perpendicular to the center point of the wheel axis, as would be derived by the teachings of Coath, and such pivotal/rotational movement in any event, would not result in or otherwise provide horizontal displacement/adjustment as contemplated by the invention of claim 15.

B. The Combination of Nijenhuis, Coslovi, Coath and Fowler is Legally Deficient To Support a *Prima Facie* Case of Obviousness Against Claims 19 and 22-23

With regard to the grounds of rejection listed as item B in Section VI above, rather than specifically address such rejection, it is suffice to say that the obviousness rejections of claims

19, 22, and 23 are legally deficient as a matter of fact and law at least for the same reasons given above for claim 15 in view of Nijenhuis and Coslovi and Coath, since claims 19, 22-23 depend directly or indirectly from claim 15.

C. The Combination of Nijenhuis, Coslovi, Coath and Hogue is Legally Deficient To Support a *Prima Facie* Case of Obviousness Against Claim 20

With regard to the grounds of rejection listed as item C in Section VI above, rather than specifically address such rejection, it is suffice to say that the obviousness rejection of claim 20 is legally deficient as a matter of fact and law at least for the same reasons given above for claim 15 in view of Nijenhuis and Coslovi and Coath, since claim 20 depends directly or indirectly from claim 15.

D. The Combination of Nijenhuis, Coslovi, Coath and Farmer is Legally Deficient To Support a *Prima Facie* Case of Obviousness Against Claim 25

With regard to the grounds of rejection listed as item D in Section VI above, rather than specifically address such rejection, it is suffice to say that the obviousness rejection of claim 25 is legally deficient as a matter of fact and law at least for the same reasons given above for claim 15 in view of Nijenhuis and Coslovi and Coath, since claim 20 depends directly or indirectly from claim 15

Accordingly, for at least the above reasons, it is respectfully requested that the Board reverse all claim rejections under 35 U.S.C. §103.

Respectfully submitted,

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Claims Appendix

1-14. (Cancelled)

15. A portable over-way platform structure for a railway system, comprising:

a portable platform configured to bridge a first track to permit pedestrian traffic to cross over the first track to and from a permanent platform, the portable platform having an uppermost surface maintained at a same level relative to the permanent platform, the portable platform being self-supporting and independent from the permanent platform for maintaining the same level;

a safety fence coupled to the uppermost surface of the portable platform and arranged transversely to a direction of the length of the first track for pedestrian safety;

a trolley coupled to the portable platform, which supports a wheel system;

a positioning system coupled between the trolley and the portable platform to provide vertical and horizontal adjustment of the portable platform relative to the wheel system to maintain the same level; and

wheels included in the wheel system to engage the first track to permit the portable platform structure to be moved along the first track to permit placement of the platform structure.

16. The structure as recited in claim 15, wherein the portable platform provides access to vehicles running on a second track, which is adjacent to the first track.

17. The structure as recited in claim 15, wherein the portable platform includes a suspension system.

18. The structure as recited in claim 15, wherein the trolley includes a steering mechanism.

19. The structure as recited in claim 15, further comprising a ramp for extending the portable platform to the permanent platform.

20. The structure as recited in claim 15, wherein the portable platform includes planks.

21. (Cancelled)

22. The structure as recited in claim 15, further comprising railings installable in the portable platform.

23. The structure as recited in claim 22, wherein the railings are configurable to restrict access by pedestrians to portions of the portable platform or beyond.

24. (Cancelled)

25. The structure as recited in claim 15, further comprising a braking system, which locks the wheels when the portable platform is in an operational position.

26-44. (Cancelled)

Evidence Appendix

There is no evidence submitted pursuant to 37 CFR §§ 1.130, 1.131 or 1.132 or any other evidence entered by the examiner and relied upon by appellant in this Appeal.

Related Proceedings Appendix

None.